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No. 93-1128

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**IN THE SUPREME COURT OF THE UNITED STATES**
**October Term, 1993**

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JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

Petitioner,

v.

FRED P. GARDNER,

Respondent.

* * * * * * * * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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# BRIEF OF AMICUS CURIAE FOR THE STATE OF TEXAS IN SUPPORT OF RESPONDENT

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# BRIEF OF AMICUS CURIAE FOR THE STATE OF TEXAS IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICUS CURIAE

This brief in support of Fred Gardner, Respondent, is submitted pursuant to Supreme Court Rule 37. Amicus curiae, State of Texas, appearing through the Attorney General of Texas, seeks this Court's affirmance of the ruling of the United States Court of Appeals for the Federal Circuit in this case, upholding the ruling of the United States Court of Veterans Appeals on November 25, 1991. The State of Texas, through its Legislature and by popular vote, has

determined that providing benefits for veterans constitutes an important public purpose. The exceptional nature of the importance attached to veterans' interests by the State of Texas is established both by amendment to the Texas Constitution and by statute. The Texas Constitution singles out veterans as an exception to the constitutional provision prohibiting the Legislature from authorizing any grants of public moneys to any individuals, associations of individuals, or municipal or other corporations. Tex. Const. art. III, § 49-b (establishing the Veterans' Land Board for the purpose of providing a means of granting land to war veterans); and art. III, § 49-b-1 (providing for bonds for Veterans' Housing Assistance Fund "in recognition of their service to their state and country.") The Texas Legislature established the Texas Veterans Commission in order to assist veterans in presenting, proving, and establishing claims and benefits they may have under federal, state or local law. *See* Tex. Gov. Code § 434.007.

The issue before this Court is whether the Veterans Administration can limit benefits to veterans injured as a result of treatment in a veteran's hospital by applying requirements not imposed by the enabling legislation. Resolution of the issue before this Court will affect the ability of veterans to apply for disability benefits currently denied them in spite of clear statutory language to the contrary. Texas, therefore, has an interest, reflected in its constitution and statutes, in assisting Respondent and other veterans similarly situated to establish their claims to benefits statutorily granted by Congress, but denied by the Veterans Administration.

## SUMMARY OF THE ARGUMENT

The issue presented by this case is whether the interpretation of the Veterans Administration of a statute which it administers is permissible. Section 1151, 38 U.S.C., provides that veterans who "have suffered an injury ... as the result of hospitalization, medical or surgical treatment ... and



such injury ... results in additional disability to or the death of such veteran, disability or death compensation ... shall be awarded in the same manner as if ... service-connected." By the promulgation of Section 1151, 38 C.F.R. 3.358, the Secretary requires that the injury be caused *by accident or negligence* before benefits are payable. Petitioner argues that the addition of the accident or negligence element is permissible agency interpretation of ambiguity in the statute, and that based on the legislative history, and the deference due agency interpretation, the Court of Appeals' decision should be reversed. Amicus disagrees.

If statutory language is clear on its face, a reviewing court need not apply principles of statutory construction. If a statute is ambiguous, or is silent with respect to a specific issue, the function of the court is to discern the meaning of the words used by the legislature. Deference is due to agency interpretation only after applying principles of statutory construction. Agency interpretations fail to the extent they conflict with statutory language. Non-action by Congress may have significance as ratifying an agency's interpretation of a statute, but as a guide to statutory interpretation, it is not favored.

Amicus herein would urge that 38 U.S.C. § 1151 (Supp. IV 1992) is clear on its face, and that the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit correctly found that the Secretary of Veterans Affairs had impermissibly limited the application of this statute by requiring veterans who had been injured as a result of treatment in a veterans hospital to show accident or negligence in order to qualify for disability or death benefits. The language of the statute is unambiguous and as such this Court need not apply principles of statutory construction other than the rule that unambiguous statutory terms be given effect. Amicus would further argue that, even applying principles of statutory construction, Petitioner's arguments still fail, and that the courts below should be affirmed. The legislative history does not express a clear intent in conflict with the plain language of the statute itself, and therefore the

language of the statute must be regarded as conclusive. No deference is due agency interpretation clearly in conflict with the plain language of the statute.

## ARGUMENT AND AUTHORITIES

**A. The statutory language is plain and unambiguous, and thus, absent exceptional circumstances, this Court's inquiry is complete by review of the statutory language standing alone. The Court need not apply other principles of statutory construction.**

"The starting point in statutory construction is, of course, the language of [the statute] itself." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 202, 98 S.Ct. 2279, 2305 (1978) *citing Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935 (1975). "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 107, 108, 100 S.Ct. 2051, 2056 (1980). "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Ex parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207 (1949), and cases cited therein." *Tennessee Valley Authority*, 437 U.S. at 184, 98 S.Ct. at 2296. The Veterans Court and the Court of Appeals for the Federal Circuit both found the statute to be plain and unambiguous. If this Court agrees, absent exceptional circumstances, the inquiry is complete. *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860 (1987) *quoting Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2nd 633 (1981). Amicus believes that the language in § 1151 granting benefits if a claimant has sustained an "injury



... as the result of" VA care is conclusive, unambiguous, and does not require an inquiry into the legislative history to divine its meaning. Thus, this Court should not reach the next level of statutory construction, which is to look at the legislative history.

**B. The Court, should it apply the principles of statutory construction, will find that the legislative history does not express a clear intent in conflict with the plain language of the statute and thus, the language of the statute itself must be regarded as conclusive. No deference is due agency interpretation clearly in conflict with the plain language of the statute.**

At the Court of Appeals, the Secretary argued that the phrase "as the result of" is ambiguous. In its brief before this Court, the Secretary argues that the word "injury" is ambiguous because it implies fault or wrong. Amicus does not agree. If the Court should proceed to an examination of legislative history for guidance, even then the Secretary's argument fails. Absent a clear expression of legislative intention to the contrary, the language of the statute is conclusive. The Secretary concedes that "it is difficult to draw any confident conclusion about the intended scope of Section 213 on the basis of the pre-enactment legislative history alone." Petitioner's Brief at 26. On its face, therefore, Petitioner's legislative history argument cannot overcome the conclusive language of the statute.

The Secretary argues that a no-fault standard "departs sharply from common-law principles of recovery for adverse medical outcomes" prevailing at the time of the enactment of the statute. The Secretary further argues that the court of appeals "should ... have sought affirmative evidence that Congress intended to depart from the common-law norm and to relieve claimants of any burden of proof of fault--even a burden that is in fact less onerous than that routinely borne by common-law malpractice plaintiffs." Brief at 20. This

argument does not take into account the legal and historical context of the enactment of this statute. In 1924 (the time of the enactment of this legislation) there was no common law right of action against a veterans hospital for negligence or malpractice because it was barred by sovereign immunity. *See, e.g., Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840, (1934). Not until 1946, with the enactment of the Federal Tort Claims Act waiving sovereign immunity for certain negligence claims, would it have been possible to sue a federal defendant. 28 U.S.C. § 1346(b) (originally enacted as Act of Aug. 2, 1946, ch. 753, Title IV, 60 Stat. 842). The context of the enactment of the statute is not, therefore, common law *liability* at all, but the extension of *benefits* to veterans who had returned from World War I. The Act, indeed, was called "World War Veterans' Act, 1924," and provides for "*benefits* [to] be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War." Sec. 213, World War Veterans' Act, 1924, ch. 320, 43 Stat. 623 (emphasis added). Benefits such as "pensions, compensation allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." *Lynch v. United States*, 292 U.S. 571, 576, 54 S.Ct. 840, 842 (1934). Certainly, other kinds of veterans benefits are not based on liability, and granting benefits is not an acknowledgment of liability. An agency rule converting a statute conferring a benefit, which may be withdrawn at any time by Congress, into a liability-based compensation for negligence or accident, conflicts with the plain meaning of the statute, and introduces legal concepts completely absent from the legislation as a whole. There is a fundamental difference between death and disability benefits and compensation for accident, personal injury or malpractice.

It is more reasonable to infer from the context of the legislation and the legislative history that the intent of Congress was to provide death and disability benefits to



veterans without distinguishing between injury resulting from negligence or accident and disability or death from unspecified "hazards of medical and surgical treatment." Petitioner's Brief at 23. Providing for disability benefits in the same manner as if the disability were war-related is more analogous to *insurance* than *damages*.

The same year Congress passed the World War Veterans Act, it also attempted to repeal "all laws granting or pertaining to yearly renewable term insurance." *Lynch*, 292 U.S. at 577, 54 S.Ct. at 842. This war risk insurance provided death and disability benefits to veterans. "War risk insurance was devised in the hope that it would, in large measure, avoid the necessity of granting pensions. Term insurance was issued at a very low premium rate." *Id.* at 842. This hope failed, and the insurance scheme had run out of money. Since Congress attempted to cancel the war risk insurance program at the same time it instituted the death and disability benefits statute at issue in this appeal, it suggests not only that the benefits were considered in the context of insurance rather than personal injury liability, but that the passage of the bill took place in a context of congressional trade-offs and negotiation.

The Secretary characterizes the plain language interpretation of "injured as a result of" as a "no-fault standard ... [which] departs sharply from common-law principles of recovery for adverse medical outcomes." Brief at 19. As has been stated above, there was, in 1924, no common law negligence cause of action in which a veteran could recover against a veterans hospital. However, even analogizing to the private sector, the statute did not purport to provide no-fault *liability* for all adverse medical outcomes, but disability and death *benefits* similar to insurance provided by employers, benevolent societies, and other groups. Disability and death benefits are not normally predicated on *fault*. Nor does case law prior to 1930 suggest that such disability insurance would have been prohibitively expensive. In the 1920's, workmens' compensation insurance provided an example of a common no-fault kind of insurance, for job-

related injuries. In fact, analogizing to benefits in the private sector predicated on negligence or accident is not useful, since, in the private sector, there would have been a cause of action for the recovery of damages. It is only against governmental entities that such a cause of action was barred by sovereign immunity.

"In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 405, 102 S.Ct. 1825, 1853 (1982). In passing the Federal Tort Claims Act waiving sovereign immunity for negligence in 1946, Congress provided damages as a remedy. *Supra*. Under the World War Veterans' Act, the remedy for "injury" is death or disability payments as if the injury were service related. The basis for recovery is not the same; the remedies are not the same. There is no reason not to assume Congress meant to do precisely what it did, in the absence of a clear expression to the contrary.

The Secretary argues, however, that the language is not so clear that it can be applied without interpretation and that, therefore, its longstanding, reasonable and contemporaneous interpretation requiring a showing of negligence or accident should control. "But of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 2863 (1989).



### C. Congressional inaction is not a sufficient basis for adopting an agency interpretation of a statute clearly in conflict with the plain meaning of the statutory language itself.

The Secretary finally argues that Congress ratified his interpretation by inaction. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 598, 600, 103 S.Ct. 2017, 2033 (1983). "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 830 (1946). As in *Girouard*, "The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of [the agency]." *Id.* The "silence of Congress" is not a sufficient basis for adopting an agency interpretation of statutory language clearly in conflict with its plain meaning. In fact, the omission by Congress of any requirement of fault or accident in the original statute, as well as its successors, may be more pointed than its failure to change the language. Since there was no judicial review of the Secretary's interpretation of such statutes until 1988, and since individual veterans had no private right of action, the inference from Congressional silence of ratification of the Secretary's rule deserves even less weight than the inference of Congressional ratification of court decisions from inaction. *See Girouard, supra; N.L.R.B. v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 307, 310-311, 94 S.Ct. 1757, 1779 (1974).

## CONCLUSION

This Court should give meaning to the plain language of the statute and affirm the Court of Appeals and the Veterans Court finding that 38 C.F.R. Sec. 3.358(c)(3)

impermissibly imposed a fault or accident requirement in implementing 38 U.S.C. 1151 (Supp. IV 1992).

Respectfully submitted,

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